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Spring Energy Sdn Bhd v Maju Holdings Sdn Bhd

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SESSIONS COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-A52C-1–01 OF 2020
ZULQARNAIN HASSAN J
1 JULY 2020

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Civil Procedure — Summary judgment — Application for — Plaintiff applied for summary judgment against defendant for due payment — Whether plaintiff entitled for summary judgment — Whether letter of intent was legally binding — Whether there was amendment of terms in letter of award — Whether payment was subject to final remeasurement — Whether there was no agreement reached on terms of payment and retention sum — Rules of Court 2012O 14 r 1

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The plaintiff applied for summary judgment against the defendant under O 14 Rules of Court 2012. The defendant operated and maintained the Maju Expressway and the plaintiff was in the business of general construction. On 6 September 2016, the plaintiff agreed to be appointed as subcontractor by the

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defendant to carry out the works of pavement rehabilitation and resurfacing at 0km to 26km on the expressway. Under the terms of the award, the ceiling price for the works is RM17,619,499. The defendant appointed HSS Integrated Sdn Bhd as its consultant engineer for the works. Five percent of the total amount was retained by the defendant as retention sum. On 19 January

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2018, the plaintiff completed the works and on 25 May 2018, the defendant issued the certificate of practical completion ('the CPC'). The CPC confirmed the completion of the works. On 22 June 2018, the defendant issued a letter to the plaintiff attaching the CPC and notifying the plaintiff on the release of the first half of the retention sum to the latter. The defendant released

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RM18,758.33 as the first half which was around 2.5% of the retention sum through the certificate No 21. On 2 July 2018, the plaintiff issued an invoice confirming the release. Between 26 October 2016 and 5 July 2018, the defendant had been issuing progress payment certificates No 1 to 21 according to the stages and progress of works. Payments had also been made to the

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plaintiff for those certificates. On 7 November 2018, the defendant issued the progress payment certificate No 22 for the balance of RM18,758.33. On 29 March 2019, the defendant issued the final progress payment certificate No 23 for the sum of RM312,638.90. On 16 April 2019, the plaintiff received the statement of final account from the defendant. The final account statement

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which was prepared by the quantity surveyor, checked by the contract manager and verified by the project director of the defendant confirms the balance due to the plaintiff. It was noted that the total works that had been executed by the plaintiff amounts to RM13,255,889.53 and it did not exceed the ceiling prize. The sum of RM331,397.23 from the progress payment certificates No 22 and

23 had not been paid by the defendant to the plaintiff. Prior to the issuance of the LOA, the defendant issued a letter of intent ('the LOI') to the plaintiff indicating its intention to award the works to the latter. Based on the LOI, the defendant pleaded that the amount to be paid should be based on quantum meruit — which meant it should be reasonable and calculated based on the market price for the value of the labour and service. On 16 October 2017, the defendant issued a letter to the plaintiff allegedly amending the LOA. The issues were: (a) whether the letter of intent was legally binding; (b) whether the letter dated 16 October 2017 had amended the terms in the letter of award; (c) whether the payment was subject to final remeasurement; and (d) whether there was no agreement reached on the terms of payment and the retention sum.

Held, allowing the plaintiff's application with costs:

(1) The law was settled that a letter of intention ('the LOI') was not an agreement unless the language in the letter specified otherwise. The language in the LOI as well as the letter of demand did not suggest that the parties intended the LOI to be binding. The court found that the letter was simply a letter and remains as such. It was signed by the Deputy Group Executive Chairman of the defendant Dato' Sri Mohd Fauzi bin Yon addressed to the plaintiff without any acknowledgement and signature of the plaintiff therein (see paras 61–62).

(2) The court was of of the considered view that the letter had never changed the scope of works as it only further clarified certain procedural aspects of the tasks. The extent of the substantive works to be carried out were still the same (see para 65).

(3) The court was of the considered view that the defendant failed to look at the letter globally. It was clear that the letter stated the issuance of certificate of making good defects ('CMGD') would signify the end of defect liability period and the balance of retention money shall be released upon issuance of the CGMD. The failure to issue take-over certificate was not fatal as it was fully satisfied that the evidence of the completion of the works were overwhelming. It was clear that the completion of the works was confirmed by the statement of account (see paras 70–71).

(4) It was clear that the essential payment term had been provided and agreed upon. The court was satisfied that it was extremely inappropriate to withhold the retention sum from the plaintiff as he was fully entitled to it following the fact that the purpose of the sum was served, which was to ensure that the works are completely carried out (see paras 75–76).

[Bahasa Malaysia summary

Plaintif memohon penghakiman terus terhadap defendan di bawah A 14 Kaedah-Kaedah Mahkamah 2012. Defendan menguruskan dan menyelenggara Maju Expressway dan plaintif menjalankan perniagaan pembinaan am. Pada 6 September 2016, plaintif bersetuju untuk dilantik sebagai subkontraktor oleh defendan untuk menjalankan kerja-kerja pemulihan permukaan jalan dan permukaan semula pada jarak 0km hingga 26km di lebuh raya. Di bawah syarat penganugerahan, harga siling untuk kerja-kerja tersebut adalah RM17,619,499. Defendan melantik HSS Integrated Sdn Bhd sebagai jurutera perunding untuk kerja-kerja tersebut. Lima peratus daripada jumlah keseluruhan disimpan oleh defendan sebagai jumlah simpanan. Pada 19 Januari 2018, plaintif telah menyiapkan kerja-kerja dan pada 25 Mei 2018, defendan telah mengeluarkan perakuan kerja siap ('PKS'). PKS mengesahkan kerja telah selesai. Pada 22 Jun 2018, defendan mengeluarkan surat kepada plaintif yang melampirkan PKS dan memaklumkan kepada plaintif mengenai pelepasan separuh pertama dari jumlah simpanan kepada plaintif. Defendan melepaskan RM18,758.33 sebagai separuh pertama iaitu sekitar 2.5% dari jumlah jumlah simpanan melalui perakuan No 21. Pada 2 Julai 2018, plaintif mengeluarkan invois yang mengesahkan pelepasan tersebut. Antara 26 Oktober 2016 dan 5 Julai 2018, defendan telah mengeluarkan sijil pembayaran kemajuan No 1 hingga 21 mengikut tahap dan kemajuan kerja. Pembayaran- pembayaran juga telah dibuat kepada plaintif untuk perakuan-perakuan tersebut. Pada 7 November 2018, defendan mengeluarkan sijil pembayaran kemajuan No 22 dengan baki RM18,758.33. Pada 29 Mac 2019, defendan mengeluarkan sijil pembayaran kemajuan akhir No 23 dengan jumlah RM312,638.90. Pada 16 April 2019, plaintif menerima penyata akaun akhir dari defendan. Penyata akaun akhir yang disiapkan oleh juruukur kuantiti, disemak oleh pengurus kontrak dan disahkan oleh pengarah projek defendan mengesahkan baki yang dibayar kepada plaintif. Ia telah disedari bahawa jumlah kerja yang telah dilaksanakan oleh plaintif adalah berjumlah RM13,255,889.53 dan ia tidak melebihi harga siling. Jumlah RM331,397.23 dari sijil pembayaran kemajuan No 22 dan 23 belum dibayar oleh defendan kepada plaintif. Sebelum pengisuan LOA, defendan telah mengeluarkan surat niat ('LOI') kepada plaintif yang menyatakan niatnya untuk menganugerahkan kerja-kerja tersebut kepada yang plaintif. Berdasarkan LOI, defendan mengaku bahawa jumlah yang harus dibayar harus berdasarkan pada quantum meruit — yang bermaksud harus wajar dan dihitung berdasarkan harga pasaran untuk nilai tenaga kerja dan perkhidmatan. Pada 16 Oktober 2017, defendan mengisukan surat kepada plaintif atas dakwaan mengubah LOA. Isu-isunya adalah: (a) sama ada surat niat itu mengikat secara sah; (b) adakah surat bertarikh 16 Oktober 2017 telah mengubah terma dalam surat penganugerahan; (c) adakah pembayaran itu tertakluk kepada kiraan semula; dan (d) adakah tidak ada kesepakatan yang dicapai mengenai terma pembayaran dan jumlah simpan.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Undang-undang yang telah diterima bahawa surat niat ('LOI') bukanlah perjanjian kecuali bahasa dalam surat tersebut dinyatakan sebaliknya. Bahasa dalam LOI dan juga surat tuntutan tidak menunjukkan bahawa pihak-pihak bermaksud LOI menjadi mengikat. Mahkamah mendapati bahawa surat itu hanyalah sepucuk surat dan kekal sebagai surat. Ia ditandatangani oleh Timbalan Pengerusi Eksekutif Kumpulan defendan, Dato 'Sri Mohd Fauzi bin Yon yang ditujukan kepada plaintif tanpa pengakuan dan tandatangan pihak plaintif (lihat perenggan 61–62).

(2) Mahkamah berpendapat bahawa surat itu tidak pernah mengubah skop kerja kerana ia hanya memperjelaskan aspek prosedur tertentu untuk tugas-tugas tersebut. Kerja-kerja substantif yang perlu dilakukan adalah masih sama (lihat perenggan 65).

(3) Mahkamah berpendapat bahwa defendan gagal melihat surat tersebut secara global. Sudah jelas bahawa surat itu menyatakan bahawa pengeluaran perakuan untuk membaiki kerosakan ('PMK') akan menandakan berakhirnya tempoh liabiliti kecacatan dan baki wang simpanan akan dilepaskan semasa pengisuan PMK. Kegagalan untuk mengeluarkan perakuan pengambilalihan adalah tidak serius kerana mahkamah berpuas hati bahawa bukti penyelesaian kerja adalah banyak. Sudah jelas bahawa penyelesaian kerja disahkan oleh penyata akaun (lihat perenggan 70–71).

(4) Adalah jelas bahawa jangka waktu pembayaran yang penting telah disediakan dan disepakati. Mahkamah berpuas hati bahawa sangat tidak wajar untuk menahan jumlah simpanan daripada plaintif kerana dia berhak sepenuhnya terhadap wang tersebut berdasarkan tujuan wang tersebut diserahkan, iaitu untuk memastikan bahawa kerja-kerja tersebut dijalankan sepenuhnya (lihat perenggan 75–76).]

Cases referred to

Dawn City Car (M) Sdn Bhd & Anor v Bank Islam Malaysia Bhd [2016] 4 MLJ 86, CA (refd)

Duta Tegas Sdn Bhd v Maju Holdings Sdn Bhd [2009] 5 AMR 411, CA (refd)

Enco Systems Sdn Bhd v Soon Hin Hardware Sdn Bhd [2009] 9 MLJ 535, HC (refd)

IASB Construction Sdn Bhd v Pembinaan Purcon Sdn Bhd [2012] MLJU 31, HC (refd)

Ismail bin Abdullah v Tenaga Nasional Berhad [2010] MLJU 1616, CA (refd)

Mascom (M) Sdn Bhd v Panji Keagungan Sdn Bhd [2011] MLJU 1222, HC (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, FC (folld)

Pickard v Sears [1837] 6 Ad & El 469 (refd)

A *Public Textiles Bhd v Lembaga Letrik Negara* [1976] 2 MLJ 58, FC (refd)
Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor [2014] 1 MLJ 287, CA (refd)
Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor [2007] 2 MLJ 221, CA (refd)
B *Sulisen Sdn Bhd v Kerajaan Malaysia* [2006] MLJU 341, HC (refd)
Swansea Stadium Management Company Ltd v City & County of Swansea and another [2019] EWHC 989, QBD (refd)
Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd [2009] 2 MLJ 546, CA (refd)
C *Victory Avenue Mfg (M) Sdn Bhd v Matsushita Electronic Devices (M) Sdn Bhd* [2009] 5 MLJ 243, HC (refd)

D **Legislation referred to**

Evidence Act 1950 s 8, 114(f)
Rules of Court 2012 O 14 r 1

Goh Jing Han (CK Oon & Co) for the plaintiff.
E *Ahmad Zhafir Rahmat (Thomas Philip) for the defendant.*

Zulqarnain Hassan J:

BRIEF INTRODUCTION

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[1] The defendant filed an appeal against this court's decision in allowing the summary application under O 14 r 1 of the Rules of Court 2012 ('the ROC') by the plaintiff (encl 5).

G **[2]** Essentially the main claim by the plaintiff is for the sum of RM331,397.23 from the works done under progress payment certificates Nos 22 and 23.

THE PRINCIPLES OF SUMMARY APPLICATION

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[3] It is settled that summary judgment is granted when a defendant has no defense to a claim. See O 14 r 1 ROC.

I **[4]** The guiding principles to grant summary judgments were propounded by the Federal Court in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 at p 301; [1984] 1 CLJ Rep 283 at p 285 as follows:

> For the purposes of an application under O 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;

(ii) the statement of claim must have been served on the defendant; and

(iii) the affidavit in support of the application must comply with the requirements of R2 of the O 14.

If the plaintiff fails to satisfy either of these considerations the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him.

[5] The practical circumstances where no triable issues arise were explained by the Court of Appeal ('COA') in *Dawn City Car (M) Sdn Bhd & Anor v Bank Islam Malaysia Bhd* [2016] 4 MLJ 86 which cited the Supreme Court as follows:

[18] In the case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 at the Supreme Court, it was said that:

Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. *Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable*. Unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. (Emphasis added.)

[6] The COA in *Ismail bin Abdullah v Tenaga Nasional Berhad* [2010] MLJU 1616 also illustrated the principle as follows:

[19] Thus, where an issue raised in an Order 14 application *is one of law and is clear-cut*, it should be disposed off forthwith instead of going to trial.

[20] And this is the right approach to adopt notwithstanding that, 'The effect of Order 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there *is no bona fide triable issue*' (per *Gopal Sri Ram JCA (later FCJ) in Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281, at p 287).

CRONOLOGICAL FACTS

[7] The defendant operates and maintains the Maju Expressway and the plaintiff is in the business of general construction.

[8] On 6 September 2016, the plaintiff agreed to be appointed as subcontractor by the defendant to carry out the works of pavement rehabilitation and resurfacing at kilometer 0 to kilometer 26 on the expressway.

A See the terms in the letter of award ('LOA') dated 1 September 2016 (exh KHM1).

[9] Under the terms of the award, the ceiling price for the works is RM17,619,499.

B

[10] The defendant appointed HSS Integrated Sdn Bhd as its consultant engineer for the works.

C **[11]** Five percent of the total amount was retained by the defendant as retention sum.

[12] It is the procedure or practice of the defendant that the amount to be paid and the valuation of work would be checked and later on recommended in
D a certificate issued by the defendant. The preparation and verification of the payment sum in a certificate were done through multiple layers of checking by the defendant's quantity surveyor, the contract manager and the project director respectively.

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[13] On 19 January 2018, the plaintiff completed the works.

[14] On 25 May 2018, the defendant issued the certificate of practical completion ('CPC'). The CPC (KHM2) confirms the completion of the works
F and states as follows:

> 3. Certification of Engineer
>
> We certify that the Works under Proposed Rehabilitation And Associated Works Along Maju Expressway have been completed on *19 January 2018*.
>
> G Signature : *sgnt*
>
> Name : Tan Sri Ir. Kuna Sittampalam
>
> Company's stamp : HSS Integrated Sdn. Bhd.

H **[15]** On 22 June 2018, the defendant issued a letter to the plaintiff (KHM-2) attaching the CPC and notifying the plaintiff on the release of the first half of the retention sum to the latter.

I **[16]** The defendant released RM18,758.33 as the first half (2.5%) of the retention sum through the certificate No 21 (KHM7).

[17] On 2 July 2018, the plaintiff issued an invoice confirming the release (KHM7).

[18] Between 26 October 2016 and 5 July 2018, the defendant had been issuing progress payment certificates Nos 1 to 21 according to the stages and progress of works (KHM7). Payments had also been made to the plaintiff for these certificates.

[19] On 7 November 2018, the defendant issued the progress payment certificate No 0022 for the balance of RM18,758.33 (KHM4). The certificate endorses and recommends the followings:

> CERTIFICATE NO. 22
>
> ...
>
> RECOMMENDATION PAYMENT including 6% GST – RM18,758-33.

[20] On 27 March 2019, the defendant issued the certificate of making good defects ('CMGD') confirming the defects had been completed by the plaintiff (KHM2).

[21] On 29 March 2019, the defendant issued the final progress payment certificate No 0023 for the sum of RM312,638.90 (KHM4).

[22] On 16 April 2019, the plaintiff received the statement of final account from the defendant (KHM3). The final account statement which was prepared by the quantity surveyor, checked by the contract manager and verified by the project director of the defendant confirms the balance due to the plaintiff as follows:

> BALANCE DUE TO SUB CONTRACTOR INCLUDING RETENTION SUM — RM312,638.90.

[23] It is noted that the total works that had been executed by the plaintiff amounts to RM13,255,889.53 and it does not exceed the ceiling prize. See the statement of final account.

[24] However the sum of RM331,397.23 from the progress payment certificates Nos 22 and 23 had not been paid by the defendant to the plaintiff.

PLEADED VERSION OF THE DEFENDANT

[25] Prior to the issuance of the LOA, on 6 June 2016, the defendant issued a letter of intent ('LOI') to the plaintiff indicating its intention to award the works to the latter (WMK1).

[26] Based on the LOI, the defendant pleads that the amount to be paid should be based on 'quantum meruit' — which means it should be reasonable

and calculated based on the market price for the value of the labor and service.

[27] The LOI states:

> 5. *In the event a formal contract between us cannot be concluded, you shall be requested to complete your work up to an agreed stage and you shall be paid for work done on a quantum meruit basis using the rates that you have submitted as a condition to start. The valuation of work done shall be carried out by our consultants.* Upon issuing to you a notice to conclude the works, any contract that exists between us shall be considered terminated.
>
> 6. *In the event a Letter of Award is issued to you and a formal contract is concluded, the terms and conditions of the Contract shall prevail and this letter of intent shall be considered null and void.* All works done by you prior to the date of the letter of award shall be paid based on the terms and conditions of the concluded contract. (Emphasis added.)

[28] On 16 October 2017, the defendant issued a letter to the plaintiff allegedly amending the LOA. The letter says:

> We confirm the following:
>
> (1) The completion of the remainder works shall not exceed the budget of RM17,619,499-00 set for the pavement rehabilitation and resurfacing works for MEX1.
>
> (2) Contract Terms & Conditions
>
> While no formal contract has been concluded, we advised the following terms and conditions to 'close' the Contract:
>
> (a) Extension of Time
> The completion period for the works has been extended to 31st March 2018.
>
> (b) Taking Over by Contractor
> Upon completion of the works, we shall issue a Taking Over Certificate (TOC) to Spring Energy. The date of completion will be stated in the TOC.
>
> (c) Release of Retention Money
> First half of retention (2.5%) shall be released upon issuance of the TOC.
>
> (d) Defect Liability Period
> The DLP shall be 12 months from the date of TOC.
>
> (e) Certificate of Making Good Defects (CMGD)
> We shall issue the CGMD to signify the end of DLP of the Contract.
>
> (f) Balance of Retention Money
> The balance of retention money shall be released upon issuance of the CGMD.
>
> Thank you.

Yours sincerely

MAJU HOLDING SDN BHD

[29] For the purpose of understanding the defense, it is useful to reproduce the statement of defense which pleads the followings:

4.1 Pada 06.06.2016, Defendan telah mengeluarkan satu Letter of Intent kepada Plaintif untuk menyatakan niatnya untuk mengawadkan kerja-kerja pemulihan dan pelupusan MEX I (Km 0 — Km 26) ('Kerja-Kerja' tersebut) kepada Plaintif;

4.2 Letter of Intent tersebut memperuntukkan bahawa sekiranya satu kontrak formal tidak diselesaikan ('concluded') untuk Kerja-Kerja tersebut, *Plaintif akan dibayar atas dasar quantum meruit bagi kerja-kerja yang dilaksanakan. Penilaian tersebut hendaklah dibuat oleh konsultan-konsultan Defendan*;

4.3 Pada 01.09.2016, Defendan telah mengeluarkan satu Letter of Award untuk melantik Plaintif sebagai kontraktor untuk Kerja-Kerja tersebut;

4.4 Skop Letter of Award tersebut kemudiannya dipinda dan/atau dikemaskini melalui surat Defendan bertarikh 16.10.2017; dan

4.5 Letter of Award tersebut memperuntukkan bahawa penilaian dan pembayaran bagi kerja-kerja yang dilaksanakan oleh Plaintif adalah tertakluk kepada pengukuran semula akhir ('final remeasurement').

5. Walaupun Letter of Award tersebut telah diisukan, tiada kontrak formal yang pernah diselesaikan dan/atau dimasuki oleh Pihak-Pihak untuk Kerja-Kerja tersebut.

6.1 *Oleh kerana tidak ada kontrak formal dimasuki oleh kedua-dua pihak, tuntutan Defendan untuk Kerja-Kerja tersebut tersebut harus dinilaikan dan dibayar atas dasar quantum meruit*; dan

6.2 *Penilaian akhir untuk Kerja-Kerja tersebut dan amaun yang akan dibayar kepada Plaintif adalah tertakluk kepada pengukuran semula akhir yang akan dijalankan oleh pihak-pihak selepas Kerja-Kerja tersebut diselesaikan*.

FINDING OF NO TRIABLE ISSUES

[30] It is wrong to consider the affidavit evidence partially. See *Enco Systems Sdn Bhd v Soon Hin Hardware Sdn Bhd* [2009] 9 MLJ 535.

[31] The above position is based on the reasoning that evaluation and decision is required to be made not after every averment in an affidavit or after each affidavit being filed. Instead it is required to be made after all the cause papers and affidavits have been filed and closed.

[32] Applying the above principle and after considering the evidence in its totality, this court is of the considered opinion that the plaintiff have proved a

clear cut prima facie case and no bona fide defense raised.

[33] The reasons for the above finding is as follows.

Official notification to release the money by the defendant to the plaintiff

[34] It is clear that there was an official notification by the defendant to the plaintiff to release the money. The letter issued on 22 June 2018 says:

> ... please find attached the Certificate of Practical Completion for your attention.
>
> *We shall arrange for the release of the first half retention (2.5%) in due course.*
>
> *The balance of the 2.5% retention will be released upon the expiry of the Defects Liability Period on 18 January 2019 on condition that all the defects have been rectified.*
>
> Yours sincerely,
>
> MAJU HOLDINGS SDN BHD. (Emphasis added.)

[35] This court even to add further that the statement of final account issued by the defendant has further confirmed that the balance due to subcontractor is RM312,638.90.

The defendant is estopped from denying its indebtedness

[36] In this court considered opinion, the defendant is estopped by its representation from denying its indebtedness to the plaintiff. This type of estoppel was described in *Pickard v Sears* [1837] 6 Ad & El 469 at p 474 which was referred to by Raja Azlan Shah FJ in *Public Textiles Bhd v Lembaga Letrik Negara* [1976] 2 MLJ 58 as follows:

> That, where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring (claim) against the latter a different state of things as existing at the same time.

The letter of award is a valid contract

[37] The law is settled that a legally binding contract requires the elements of capacity, offer, acceptance, consideration and intention. See *Sulisen Sdn Bhd v Kerajaan Malaysia* [2006] MLJU 341.

[38] Under the circumstances of the case, this court finds that the LOA constitutes a legally binding contract as it has all the required elements of a legally binding contract. The letter states, inter alia:

> ... We, Maju Holdings Sdn Bhd. (MHSB) are pleased to accept the offer of Spring Energy Sdn Bhd (SESB) for the pavement rehabilitation and resurfacing works (the Works) on the Maju Expressway (MEX1).

2. ...

3. ...

4. The Letter of Award is issued to you in one (1) Original and two (2) Duplicates. Please signify your acceptance to *the above terms and conditions* by returning the Original and one (1) Duplicate of the letter duly signed and witnessed to us. The remaining Duplicate is for your retention.

Thank You.

Yours sincerely

sgnt

Dato' Sri Mohd Fauzi bin Yon

Deputy Group Executive Chairman

ACKNOWLEDGEMENT

I/We Yap Soon Huat in the capacity of MANAGING DIRECTOR duly authorized to sign for and on behalf of Spring Energy Sdn Bhd hereby *confirm our agreement to abide by the terms and conditions* as stipulated in the Letter of Intent ref. no. Our Ref: MHSB/DSMFY/MFAS/SWN/20160901 dated 1st September 2016.

Sgnt Sgnt of Witness

Name: YAP SOON HUAT Name:YAP YEE HUAT

Designation: Managing Director Designation: Executive Director

Date: 06 September 2016 Date: 06 September 2016

stamp of the plaintiff'

[39] The word 'the letter of intent' referred to in the acknowledgement is clearly a clerical error. This court finds that it was intended to be 'letter of award' as the date and reference refer to the latter.

Essential terms on the payment had been provided and agreed in the letter of award

[40] The court is satisfied that the essential and necessary terms in the LOA with regard to the payment had been expressly provided and agreed upon by the parties. They are as follows:

(a) payment must be based on the works done;

(b) final value must not exceed the ceiling sum; and

(c) the valuation must be done by the consultant.

[41] The above findings can be found from the language in the LOA which states the followings:

2. The value of the Works executed shall not exceed the Ceiling Sum. *SESB shall be paid according to the works executed if the final remeasured value does not exceed the Ceiling Sum*.

A 3. ... *The valuation of the works executed by SESB shall be carried out monthly by our Consultants*, Messrs HSS Integrated Sdn Bhd in association with GeoPave Consultants Sdn Bhd, whilst pending the formalization of a contract between MHSB and SESB. (Emphasis added.)

B *No issues pertaining to the previous certificates*

[42] The court is satisfied that there had been previous payments from the certificates Nos 1 to 21 issued by the defendant to the plaintiff. However no complaint arose from the defendant. See certificate No 1 to 21 ('KHM7').

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[43] Under the law of evidence, these previous payments amount to conducts and subsequently are relevant under s 8 of the Evidence Act 1950 ('the EA').

D *The certificates as basis*

[44] It is significant to note that a certificate is essentially a formal decision or approval which determines an entitlement to payment or relief of some sort. See also the definition in *Ben Patten QC and Hugh Saunders, Professional Negligence in Construction* (2nd Ed) (2018, Routledge), p 103.

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[45] It is clear that the value and amount to be paid to the plaintiff as stated in the certificates Nos 22 and 23 had been recommended after going through checking of multiple layers by the defendant's own competent, qualified and professional officers.

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[46] The law is settled that the fact that the certificates were prepared, checked and verified by the defendant's authorized officers has triggered the application of the presumption that the common course of business had been followed. See s 114(f) of the EA.

G

[47] It is the finding of this court that the presumption is never rebutted ie no affidavit deposed by the defendant's officers contending that the valuation is wrong.

H

Issuance of the certificate amounts to admission

I **[48]** This court also fully agrees with the submission of the plaintiff that the official issuance the certificate would amount to an admission of the defendant that the plaintiff is entitled to the payments. See the COA decision in *Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor* [2007] 2 MLJ 221 which explained as follows:

[12] The next issue which was raised by the defendants is that there is here not an immediately payable debt because there is no time specified within which the monies certified by certificate 11 should be paid. We find no merit whatsoever in this argument. Once certificate 11 was issued by the second defendant specifying the amount that was due under that certificate, it became an immediately payable debt (see *Crown House Engineering Ltd v Amec Projects Ltd* 48 BLR 32). Further, in this case, unlike the usual case where it is an architect who issues an interim certificate, it is the second defendant itself that did so. *Certificate 11 is accordingly, in our judgment, an admission by the second defendant to the second plaintiff that the sum stated therein is due and payable*. The defendants' attempts to discover all sorts of excuses to avoid paying the second plaintiff what is due to it for work done strongly supports an inference that the defendants' lack of bona fides.

[49] To further strengthen the finding, the completion of the works and the certification made by the defendant is in fact admitted by the defendant as stated in para 7 of the defense.

[50] In this regard, para 5 of the statement of claim pleads:

Pada 19.1.2018, Plaintif telah menyempurnakan Kerja-Kerja tersebut. Jurutera perunding Kerja-Kerja tersebut (HSS Intergrate Sdn Bhd) telahpun mengesahkan Perakuan Siap Kerja (Certificate of Practical Completion) yang bertarikh 25.5.2018 dan Perakuan Siap Membaiki Kecacatan (Certificate of Making Good Defects) yang bertarikh 27.3.2019.

[51] In reply to the para 5, para 7 of the defense pleads:

Perenggan 5 Tuntutan adalah diakui.

Finality and clarity of the certificates

[52] It is plain that the certificates have the elements of clarity, finality and incontrovertibility. See *IASB Construction Sdn Bhd v Pembinaan Purcon Sdn Bhd* [2012] MLJU 31 (HC) which held:

The defendant does not deny that there were defective works. However, a close scrutiny of the letters/complaints exhibited by the plaintiff in Enclosure 16 are all letters/complaints in respect of defects issued prior to the issuance of the Certificate of Practical Completion on 7.12.2004. Furthermore, a Certificate of Making Good Defects (CMGD) was also issued by the SO, the plaintiff's agent as also the Statement of Final Account and Final Payment dated 16.12.2006.

The CMGD issued by the plaintiffs own agent, the SO, is clear and incontrovertible evidence that the defendant had made good the defects found in the building works.

I concur with the defendant that this third issue is an afterthought and certainly does not call for a trial.

[53] The engineer consultant expressly certified in writing that the works and the defects had been completely made good by the plaintiff. The CMGD states:

> 1. Request For Issue of Certificate of Making Good Defects
> We request the issue of the Certificate of Making Good Defects for the Works under Proposed Pavement Rehabilitation And Associated Works Along Maju Expressway.
>
> 2. Confirmation by Contractor
> We confirm that the defects in the works including the defects listed in Appendix A during the Defects Liability Period have been completed on 19 January 2019.
> Signature : *sgnt*
> Name : Richard Whitehead
> Company's stamp : MAJU HOLDINGS SDN BHD
>
> 3. Certification of Engineer
> We certify that the rectification works under Proposed Pavement Rehabilitation And Associated Works Along Maju Expressway have been completed on 19 January 2019.
> Signature : sgnt
> Name : Tan Sri Ir. Kuna Sittampalam
> Company's stamp: HSS INTEGRATED SDN BHD

[54] On the finality of the certificate, see also *Swansea Stadium Management Company Ltd v City & County of Swansea and another* [2019] EWHC 989 and the COA's decision in *Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor* [2014] 1 MLJ 287.

Reasonableness of the valuation

[55] This court has also to consider reasonableness on the issue of valuation. See *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546 where the Court of Appeal (COA) held:

> (per Abdul Malik Ishak JCA, concurring) The appellant in seeking a quantum meruit was actually seeking a sum that will provide him the value of what he had done for the respondent. However, in this case, according to the agreement, *without the engineer's certification the appellant's claim in quantum meruit was without basis and could not succeed*. In addition if the appellant had done any work as claimed by them, they ought to have it assessed immediately after the termination as provided in the agreement. The delay must be construed adversely against the appellant (see para 41).
>
> [41] Here, everything depends on the certification by the engineer. Without the engineer's certification, the appellant contractor's claim purportedly in quantum meruit is without basis. A claim in quantum meruit would be made on the basis that the respondent employer had derived a benefit from the work done by the appellant

contractor and; *if this is so, a reasonable remuneration has to be paid to the contractor*. But the learned judge of the High Court found that there was no evidence to support the appellant contractor's claim for quantum meruit.

... in a quasi-contract situation (a classic example would be when work is carried out while negotiations as to the terms of the contract are proceeding but agreement is not reached upon essential terms, the contractor is entitled to be paid a reasonable sum for the work carried out (*Trollope & Colls Ltd and Holland & Hannen and Cubitts Ltd, Trading as Nuclear Civil Constructors (a firm) v Atomic Power Constructions Ltd* [1963] 1 WLR 333; and *Peter Lind & Co Ltd v Mersey Docks and Harbour Board* [1972] 2 Lloyd's Rep 234);

[43] The term 'quantum meruit' is a Latin term. In Latin, it means 'how much he desires'. It is a common terminology in an action of general assumpsit to recover payment for the value of labour and services.

[44] It must be borne in mind that when the appellant contractor is seeking a quantum meruit it is seeking not a precise sum of money nor a sum representing the general damages incurred by the appellant contractor as a result of some wrongful act on the part of the respondent employer. Rather the appellant contractor is seeking a sum that will provide the appellant contractor with the value of what the appellant contractor has done for the respondent employer. And this is usually calculated by reference to the market price or value of the services (see JW Carter, Ineffective Transactions [2009] 2 MLJ 546 at 563 in PD Finn, ed, Essays on Restitution (North Ryde, NSW The Law Book Company Limited 1990, 206 at pp 235–240)).

[45] It goes without saying that a quantum meruit claim may be contractual as in the case of*J & J Penner Construction Ltd v Cringan* [1994] 93 Man R (2d) 252 (QB) where the whole scenario was governed by a contract between the parties but they had not fixed the price for the services rendered by the plaintiffs there. It is also prudent to read *Campbell, Albo, Low Limited v Black* (1995) 26 OR (3d) III (General Division); [1995] Ont Rep Lexis 37; and *Westview Holdings Ltd v John Mowbray and Saskatchewan Government Insurance* [1991] Sask R Lexis 990at p 94 Sask R 263, Saskatchewan Court of Queen's Bench, Judicial Centre of Regina.

[56] Based on the factual circumstances of the case, it is the considered view of this Court that the formal valuation expressly stated in the certificates is reasonable. Surely the project manager and other officers would not endorse the payment had it been unreasonable.

The pleaded defense discloses no valid complaint on the quantum in the certificates

[57] It is a cardinal principle that the parties to an action are bound by their own pleadings. From the averments in the plaintiff's pleadings it is obvious that the defendant has not specifically pleaded a reasonably acceptable defense for this court to accept such as the followings:

(a) the amount does not commensurate with the value of the works and accordingly unreasonable;

(b) the amount is not in accordance with the market value;

(c) the defendant is not satisfied with the works done by the plaintiff;

(d) there is a mistake and/or fraud in the certificates;

(e) the amount certified by the engineer is excessive; and

(f) the certifier has no authority, integrity, qualification and competence needed of a certifier.

[58] It follows that the above are not pleaded defenses for this court to consider. See *Victory Avenue Mfg (M) Sdn Bhd v Matsushita Electronic Devices (M) Sdn Bhd* [2009] 5 MLJ 243.

ANSWERS TO THE ISSUES RAISED BY THE DEFENDANT

Issue 1: Whether the letter of intent is legally binding

[59] It is the case of the defendant that the LOI is legally binding and since no formal contract had been entered, accordingly payment had to be made on *quantum meruit.* See para 5 of the LOI.

[60] In this regard, the written submission by the defendant contends the following:

> 3.1 The Letter of Award was issued pursuant to the Letter of Intent.

[61] To the humble view of this court, the law is settled that a LOI is not an agreement unless the language in the letter specifies otherwise. See *Mascom (M) Sdn Bhd v Panji Keagungan Sdn Bhd* [2011] MLJU 1222 which cited as follows:

> The effect and significance of a letter of intent had been discussed in the case of Turiff Construction Ltd and Turiff Ltd v. Regalia Knitting Mills Ltd 9 BLR 20 QBD 20 (at pg 22 para 3) where His Lordship Judge Fay had this to say:
>
> As I understand it such a letter is no more than the expression in writing of a party's intention to enter into a contract at a future date. Save in exceptional circumstances it can have no binding effect.
>
> And at page 22 para 4 His Lordship went further to say:
>
> A Letter of Intent would ordinarily have two characteristic, one, that it will express an intention to enter into a contract in the future and, two, it will itself create no liability in regard to future contract.
>
> (please also see *Kokomewah Sdn Bhd v Desa Hatchery Sdn Bhd* [1995] 1 MLJ 214; [1995] 3 CLJ 511; *Low Kar Yit v Mohd Isa* [1963] 1 MLJ 165; *Ayer Hitam Tin*

Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754; [1994] 2 CLJ 133).

[62] The court would add further that the language in the LOI as well as LOA does not suggest that the parties intended the LOI to be binding. The court finds the letter is simply a letter and remains as such. It was signed by the Deputy Group Executive Chairman of the defendant Dato' Sri Mohd Fauzi bin Yon addressed to the plaintiff without any acknowledgement and signature of the plaintiff therein.

Issue 2: Whether the letter dated 16 October 2017 has amended the terms in the letter of award

[63] In his written submission, the defendant says:

> 3.2 The scope of the Letter of Award was later amended and/or revised by way of the Defendant's letter dated 16.10.17.

[64] In reply, it is the contention of the plaintiff that the letter does not amend the scope of works as the scope is still the same.

[65] After scrutinising the express terms in the letter, this court is of the considered view that the letter has never changed the scope of works as it only further clarifies certain procedural aspects of the tasks. The extent of the substantive works to be carried out are still the same.

[66] Also, the defendant argues that a triable issue has been raised as the TOC had never been been issued. In this relation, the written submission states the issue as follows:

> 11.5 Whether the Plaintiff is entitled to the release of the retention sum when there has never been a Take Over Certificate issued for the Works pursuant to the Letter of Award.

[67] After considering the argument, this court finds that TOC is not the only test to determine whether the works had or had not been completed. In view of the overall factual circumstances of the case including the fact that the defendant had issued CMGD, it is plain that the works had been completely carried out by the plaintiff.

Issue 3: Whether the payment is subject to final remeasurement

[68] It is the argument of the defendant that payment must not be made unless and until final remeasurement had been carried out. The written submission states:

4.2 The final valuation of the Works and amount to be paid to the Plaintiff is subject to final remeasurement.

[69] In reply, the plaintiff submits that the final measurement had been carried out following the final statement of account had been issued to the plaintiff.

[70] Under the circumstances of the present case, this court is of the considered view that the defendant has failed to look at the letter globally. It is clear that the letter also states the issuance of CMGD would signify the end of defect liability period and the balance of retention money shall be released upon issuance of the CGMD. Therefore the failure to issue TOC is not fatal as this court is fully satisfied that the evidence of the completion of the works are overwhelming.

[71] It is clear that the completion of the works is confirmed by the statement of account.

[72] To further fortify the finding, the CMGD had been issued and the certificate No 23 expressly uses the word 'FINAL'.

This 0023 certificate states:

'CERTIFICATE NO. : 23 *(FINAL)*

...

RECOMMENDATION PAYMENT including 6% GST – RM312,638-90'. (Emphasis added.)

[73] The word 'final' means '1. being or happening at the end of a series of events, actions, statements, etc 2. being the result of a particular process 3. that cannot be argued with or changed'.

See Oxford Learner's Dictionaries. https://www.oxfordlearnersdictionaries.com/definition/english/final.

Issue 4: No agreement reached on the terms of payment and the retention sum

[74] The defendant contends that no agreement had been reached on the terms of payment and the retention sum and therefore the plaintiff has failed to prove its entitlement to the claim.

[75] This court finds it hard to agree with the defendant. It is clear that the the essential payment term had been provided and agreed upon. The LOA clearly put the word 'paid' and states that 'SESB shall be paid according to the

works executed if the final remeasured value does not exceed the Ceiling Sum.' A

[76] This court is satisfied that the it is extremely inappropriate to withhold the retention sum from the plaintiff as he is fully entitled to it following the fact that the purpose of the sum has been served, which is to ensure that the works are completely carried out. B

CONCLUSION

[77] This court has considered the authorities submitted by the defendant and is satisfied that the facts and circumstances are materially different from the present case. Accordingly, this court could not take the authorities as binding on the present case. C

[78] This court fully agrees with the submission of the plaintiff that the facts in the present case are almost similar to the COA's case of *Duta Tegas Sdn Bhd v Maju Holdings Sdn Bhd* [2009] 5 AMR 411, where it was held that: D

> [19] From the exhibits adduced by the plaintiff, there is clear evidence to show that there is a contract between the Plaintiff dan the Defendant The fact that the defendant had issued THK1, THK 2 to the Plaintiff indicates there was a contract between the Plaintiff and the Defendant. *Surely the Defendant would not have sent documents which states about the value of the contact and the details as to the amount of work done to someone that has got nothing to do with the defendant. It is pertinent to note that those documents originated from the defendant, not the plaintiff. To top it all, there were some payments made by the defendant to the Plaintiff for the contract.* How would the defendant explain for the said payments, if not for the contract that had been executed by the plaintiff for the defendant. E F
>
> [21] Against the above factual matrix, the defendant's attempt at arguing there was no contract is implausible. G

[79] After considering the relevant papers, this court finds that:

(a) the plaintiff has complied with all the requirements under O 14 r 1 ROC; and

(b) the plaintiff has established clear cut and a prima facie case and the defense is merely a bare denial. No bona fide triable issues has been raised by the defendant. H

[80] Undoubtedly the defendant only has raised excuses simply to refuse or delay the payment. I

[81] Accordingly the application is allowed with cost.

The plaintiff's application allowed with costs.

Reported by Mohd Kamarul Anwar